REPORT OF THE OFFICE OF THE DISTRICT ATTORNEY

INQUIRY INTO ALLEGATIONS OF VIOLATION OF

THE RALPH M. BROWN PUBLIC MEETING LAW BY

THE AGENCY FOR COMMUNITY DEVELOPMENT FOR

THE CITY OF GARDEN GROVE

TONY RACKAUCKAS

DISTRICT ATTORNEY
COUNTY OF ORANGE

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INTRODUCTION

On August 25, 2004 the Orange County District Attorney's Office received complaints alleging that the Garden Grove Agency for Community Development (hereinafter the Agency), violated the Ralph M. Brown Act (Brown Act) (Govt. Code § 54950 et seq.) by meeting together in a non-public "serial meeting" on May 25, 2004 in Las Vegas, Nevada.

Subsequently, it was alleged that on June 8, 2004, and June 22, 2004, the Agency met in closed session for a matter that was not properly described on the Agenda, and that during that closed meeting discussed matters that should have been aired in a public session.

This Office instituted an extensive inquiry into these complaints as part of its oversight function under Government Code section 54960. In doing so relevant witnesses were interviewed and documents examined. The matter was discussed in some detail with counsel for the City of Garden Grove and the Garden Grove Agency for Community Development, who were also afforded an opportunity to comment upon our tentative findings. This final report is the result of this process.

The Report is organized as follows: A summary of the facts developed in this inquiry is preceded by a discussion of the applicable law, so that the facts can thereby be better evaluated and judged. A discussion of the enforcement mechanisms provided in the Act follows. This format follows from the particular regulatory scheme provided by the Brown Act, which provides for notice of violations and an opportunity for correction by the Legislative body, when such violations are brought to its attention. Accordingly, **the fact that there may be violations of the Brown Act does not necessarily support criminal or civil prosecutions by the District Attorney as his first action.** An Analysis and Conclusions section follows, and is subdivided into four subsections: Criminal Liability, Civil Liability, Findings, and Recommendations. The first two subsections will analyze and discuss the conclusions with respect to enforcement actions. The Findings subsection addresses our conclusions concerning violations of the Brown Act. The Recommendations subsection offers suggestions for the future, followed by a brief summary of the report's conclusions. We turn now to the applicable law.

APPLICABLE LAW

The **Brown Act** is codified in Government Code section 54950 et seq. Its stated purpose is as follows:

> [T]he Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. **The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what**

> **is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.** (Govt. Code § 54950 (emphasis added).)

To fulfill this purpose, with only limited exceptions, the Act requires that: "**All meetings of the legislative body of a local agency *shall be open and public*, and all persons shall be permitted to attend…"** (Govt. Code § 54953 (emphasis added).) A "meeting" is broadly defined:

> **A "*meeting includes any congregation of a majority* of the members of a legislative body at the same time and place to hear, discuss *or deliberate* on any matter which is under the subject matter jurisdiction of the agency.**" (Govt. Code § 54952.2, subd. (a) (emphasis added).)

> **Thus, 'the Brown Act ... is not limited to gatherings at which action is taken by the relevant legislative body; 'deliberative gatherings' are included as well**." [Citations.] **Deliberation in this context connotes not only collective decision making, but also "*the collective acquisition and exchange of facts preliminary to the ultimate decisions*"** [Citations.] (*216 Sutter Bay Associates v. County of* Sutter (1997) 58 Cal.App.4th 860, 876-877 (emphasis added).)

The reasoning behind this expansive definition of "meeting" is grounded in the purpose behind the Brown Act itself.

> [Section 54950] is a deliberate and palpable expression of the act's intended impact. **It declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that *the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either."*** [Citations.] ***The…term "meeting" must be construed expansively*** to prevent local legislative bodies from evading the requirements of the Brown Act: In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors**.** (*Frazer v. Dixon Unified School* District (1993) 18 Cal.App.4th 781, 794-795 (emphasis added).)

There are **limited exceptions** to these requirements. Government Code § 54952.2 (c) (1) enacted in 1993 provides that **individual contacts** between a member of a legislative body and any other person are not proscribed. The purpose of this exception appears to be to

protect the constitutional rights of individuals to contact their governmental representatives regarding issues which concern them. Government Code § 54952 (b) provides that "**advisory committees**, composed solely of the members of the legislative body that are ***less* than a quorum**" (except for standing committees with a continuing subject matter) are not legislative bodies, and therefore not subject to the open meeting requirements of Government Code § 54953 (a).

Court decisions have held that the Brown Act's exceptions to its open meeting requirements should **be narrowly construed**. For example, the use of an "advisory committee" is contemplated as a prelude to a full and complete public discussion of the matter. It is not to be employed as a subterfuge to allow a quorum to deliberate on public business by separate meetings each not containing a quorum. Such "serial meetings" are not within any exception.

> [The open meeting requirements of the Brown Act excludes a] committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body. However, **this exception contemplates that the part of the governing body constituting less than a quorum "will report back to the parent body where there will then be a *full opportunity for public discussion* of matters not already considered by the full board or a quorum thereof."** [Citations.] Such is not the case where a number of the members sufficient to constitute a quorum of the legislative body has already been informed and deliberated, albeit serially, on a matter of public business by the time the matter reaches the stage of public discussion. [Citation.] **Thus, a series of nonpublic contacts at which a quorum of a legislative body is lacking at any given time is proscribed by the Brown Act if the contacts are "planned by or held with the collective concurrence of a quorum of the body to privately discuss the public's business" either directly or indirectly through the agency of a nonmember.** [Citations.] (*Stockton Newspapers, Inc. v. Redevelopment* Agency (1985) 171 Cal.App.3d 95, 102-103 (emphasis added).)

Along with "serial meetings," other artifices intended to avoid the Brown Act's requirements, such as the use of intermediaries, telephone calls, letters or memoranda, have been frowned upon by the courts.

> To prevent evasion of the Brown Act, a series of private meetings (known as serial meetings) by which a majority of the members of a legislative body commit themselves to a decision concerning public business **or engage in collective deliberation on public business would violate the open meeting requirement.** (*216 Sutter Bay Associates, supra,* 58 Cal.App.4th at 876-877 (emphasis added).)

Among the Legislature's 1993 amendments to the Brown Act, is Government Code § 54952.2(b) which seeks to deal directly with the issue of serial meetings. It provides, **"[A]ny use of direct communication, a personal intermediary or technological devices…by a majority of the members of the legislative body *to develop a collective concurrence* as to action to be taken on an item…is prohibited**." Accordingly, the Act expressly prohibits serial meetings which are conducted through direct communications, intermediaries or technological devices for the purpose of developing a concurrence as to action to be taken. This provision raises two questions: first, what is a serial meeting for purposes of this definition; and second, what does it mean to develop a concurrence as to action to be taken. (See Attorney General's booklet, *The Brown Act)*

Typically, a serial meeting is a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the body's members. In addition a serial meeting occurs when intermediaries for board members have a meeting to discuss issues. The statutory definition also covers a situation by which technological devices are used to connect people at the same time who are in different locations.

Once such serial communications are found to exist, it must then be determined whether communications were used "to develop a concurrence as to action to be taken." In its instructive booklet on the Brown Act, the Attorney General's Office has suggested: "In construing these terms, one should be mindful of the ultimate purpose of the Act—to provide the public with an opportunity to monitor and participate in the decision making processes of boards and commissions."

In his Brown Act booklet the Attorney General has concluded that, "The express language of the statute concerning serial meetings largely codifies case law developed by the courts and the opinions issued by this office in the past." Relying in part on the reasoning of these earlier court cases as well as his booklet's guidelines, the Attorney General concluded in a 1998 opinion that "deliberative" or "fact gathering" meetings remain subject to the open meeting requirements of the Brown Act.

> Finally, **the general purposes of the [Brown] Act are to ensure not only that any final actions by legislative bodies of local public agencies are taken in a meeting to which the public has advance notice but also that any deliberations with respect thereto are conducted in public as well.** [Citations.] "Deliberations" here would include mere attendance, resulting in the receipt of information. [Citation.] ". . **. Deliberation in this context connotes not only collective decision making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision**." [Citations.] Thus without the special exemption for "observers," **the mere attendance at the meeting by a quorum of the legislative body would constitute a violation of the Act.** (81 Ops.Atty.Gen.Cal 156 (1998), pp. 6-7 (emphasis added).)

More recently, in a (2001) opinion, interpreting § 54952.2(b), the Attorney General concluded that the phrase, "to develop a collective concurrence," does not exclude "deliberative" or "fact gathering" meetings from the requirements of the Act.

> The purposes of the Brown Act are thus to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. **Not only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions taken.** [Citations.] **The term 'deliberation' has been broadly construed to connote not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.**
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> In analyzing the language of section 54952.2, we may apply well recognized principles of statutory construction. We are to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citations.]
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> As for the requirement …**"to develop a collective concurrence as to action to be taken on an item," we note that *such activity would include any exchange of facts*** [citations] **or**, as we have previously explained in our pamphlet on the Brown Act, **substantive discussions "which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, <u>or advance the ultimate resolution of an issue</u>"** [citation] **regarding an agenda item**. (84 Ops.Atty.Gen.Cal. 30 (2001), pp. 3-6 (emphasis added).)

"Accordingly," in his booklet, the Attorney General concludes that, "with respect to items that have been placed on an agenda **or are likely to be placed on an agenda**, members of legislative bodies should avoid serial communications of a substantive nature concerning such items."

Opinions of the Attorney General, though not binding authority, are entitled to "great weight."

> The contemporaneous construction given to the meaning of a statute by the Attorney General who is charged by law with advising the enforcement agencies as to the scope of the law, is entitled to great weight. [Citation.] This rule is particularly pertinent … where the Attorney General's opinion seems to logically comport with the broad regulatory purpose of the statutes. (*Wallace v. Department of Motor Vehicles* (1970) 12 Cal.App.3d 356, 362-363.)

These Attorney General opinions appear to comport with the regulatory purpose of the Brown Act, as well as the cases interpreting the Act. That purpose, as noted in one of the opinions, is "to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government." (84 Ops.Atty.Gen.Cal. 30 (2001), at p. 2.)

Past Attorney General's opinions in this area have a good track record. Stockton Newspapers, Inc. v. Redevelopment Agency, supra, a case that predates the 1993 amendments provides a good review of the legislative history of some changes to the Brown

Act that supports the opinions of the Attorney General. Interestingly, this case involved a previous attempt to narrowly define those meetings subject to the Act's open meeting requirements.

> Following a narrow judicial construction of the word "meeting" (*Adler v. City Council* (1960) 184 Cal.App.2d 763), **the Legislature amended the Brown Act to make clear that legislative action within the act was not necessarily limited to action taken at a formal meeting.**
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> Reviewing the effect of the 1961 amendments, the Attorney General observed there is "little, if any, strength left" to the decision in *Adler v. City Council, supra*. (42 Ops.Cal.Atty.Gen. 61, 67 (1963).) Since the law as amended "prohibits secret gatherings at which a majority of the members of the legislative body agree or agree to agree," **it is highly unlikely that "a California court would persist in maintaining that a majority of the members of a local legislative body, without complying with the statute ... could nevertheless meet together in a so-called 'informal,' 'study,' 'discussion,' informational,' 'fact finding' or 'pre-council' gathering for the avowed purpose of discussing items of general importance irrespective of whether the individual members of the legislative body intend or do not intend to take 'action' at such a gathering."** [Citation.] **Indeed, this court has since dealt with that very issue and resolved it consistently with the Attorney General's forecast.**
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> The collective decision making process consists of both "actions" and "deliberations" which must respectively be taken and conducted "openly." [Citation.] Thus the meeting concept can not be confined exclusively to either action or deliberation but rather comprehends both and either. [Citation.] Since deliberation connotes not only collective discussion but also the "collective acquisition and exchange of facts preliminary to the ultimate decision," **the Brown Act is applicable to collective investigation and consideration short of official action.** [Citation**.] In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques.**
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> Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.—[Citation.] (*Stockton Newspapers, Inc., supra,* 171 Cal.App.3d at 100-103) (emphasis added).)

The language defining a meeting in Government Code section 54952.2, subdivision (a), likewise enacted in 1993, continues to support this expansive view of the term "meeting." That statute **defines "meeting" to include a congregation of a majority to "<u>hear</u>, <u>discuss</u> or <u>deliberate</u>."** (Govt. Code § 54952.2, subd. (a) (emphasis added).) These terms clearly evince a Legislative intent that deliberative and fact-gathering meetings are still subject to the open meeting requirements of the Brown Act.

Recent Court decisions do not evidence an intent to either restrict the type of meetings subject to the Act's open meeting requirements, or expand the exceptions to those requirements. Instead they continue to reaffirm that the Brown Act's open meeting requirements are to be interpreted liberally; its exceptions, narrowly.

> **Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act "sunshine law" is construed liberally in favor of openness in conducting public business.** [Citations.] Statutory language "must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute [citation], and **where possible the language should be read so as to conform to the spirit of the enactment**. [Citation.]
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> **It is, of course, well established that the Brown Act should be interpreted liberally in favor of its open meeting requirements, while the exceptions to its general provisions must be strictly, or narrowly, construed.** (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917, 920 (emphasis added).)

The only other relevant exception to the Act's open meeting requirements is provided by Government Code section 54956.8. It states:

> [A] legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency **to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease. However, prior to the closed session, the legislative body of the local agency *shall hold an open and public session* in which it identifies its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate.** (Emphasis added.)

Government Code section 54954.5, subdivision (b), the so-called "safe harbor" provision, provides that with respect to closed sessions held under Government Code section 54956.8 the agenda must also disclose the property, agency negotiator, negotiating parties and "whether instruction to the negotiator will concern, price, terms of payment or both." (Govt. Code § 54954.5, subd. (b).) Moreover, "[a]fter the legislative body holds such a closed session, it must reconvene into open session and make a public report of the actions taken during the closed session." (*Shapiro v. San Diego City Council, supra*, 96 Cal.App.4th at 920.)

The exception provided by Government Code section 54956.8 is limited to the reason behind it: to set the terms of a real property sale or acquisition already decided upon in a public session and to instruct the negotiator accordingly.

> As one commentator has noted, "The need for executive [closed] sessions in this circumstance is obvious. No purchase would ever be made for less than the maximum amount the public body would pay if the public (including the seller) could attend the session at which that maximum was set, and the same is true for minimum sale prices and lease terms and the like." [Citation.] (*Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 331-332.)

Nevertheless, this exception should not be used for the discussion of broader matters that should be in public sessions. “A negotiator has to be pursuing some specific transaction, which itself is the subject item of business that should be disclosed. A negotiator does not negotiate in a vacuum.” (*Shapiro v. San Diego City Council, supra*, 96 Cal.App.4th at 919, 921.”

In order to invite meaningful public involvement, notice requirements are applicable to all open meetings and exceptions as well. Only topics on an agenda, posted in a publicly accessible place at least 72 hours in advance of the meeting, may be discussed.

> At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, ***including items to be discussed in closed session.***
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> **No action *or discussion* shall be undertaken on any item not appearing on the posted agenda**…. (Govt. Code § 54954.2, subd. (a) (emphasis added).)

We next move to the relevant factual background.

DEVELOPED FACTS

There are five elected members of the Garden Grove City Council, which also sits as the Board of Directors (the Board) of the Garden Grove Agency for Community Development (the Agency). The City Manager sits as the Agency’s Executive Director.

In **April of 2003**, an individual interested in developing an Indian cultural center in the City’s tourist district met with a different Board member in three separate meetings. The City manager (i.e., the Agency’s Executive Director) attended each of these meetings. It is unclear from the evidence whether these meetings were scheduled with the concurrence of each of the Council members. Nevertheless, the idea of developing an Indian gaming casino in Garden Grove was raised at these meetings and communicated to a quorum of the Board. Several months later this individual re-contacted the Executive Director and informed him that an Indian tribe, which met certain federal guidelines, could acquire property outside of its reservation and then apply to the state government for a gaming compact. Several months after this, a formal proposal to develop an Indian casino in

Garden Grove was submitted to the Agency. The Executive Director found this proposal "attractive," but the individual submitting it not qualified to execute the project.

The Agency's staff, nevertheless, continued to explore the Indian casino concept. From a "community acceptance standpoint," the Agency's staff concluded that an Indian casino "would probably not be well received unless packaged as part of a world class resort." The project, it was concluded, therefore could not be considered unless part of a resort.

In **March or April of 2004**, the Project Manager contacted Wynn Resorts, a Las Vegas casino and resort developer, to, in his words, ascertain that firm's interest in the "International West" concept and "what we were trying to do with economic development…." "International West is a 400 acre resort master plan which includes motels, entertainment and retail." It was the Project Manager's own idea to make this contact. A Wynn representative expressed interest ***if*** a "gaming component" were included. In April of 2004, a Wynn representative met with the Executive Director and Project Manager to gather information. The Agency's Board was not involved.

In **May of 2004** the Executive Director, Project Manager and two members of the Board were to attend an annual conference in Las Vegas, Nevada. Thinking it advantageous for the Board to meet with Wynn, while there, the Project Manager made arrangements for two additional Board members to fly to Las Vegas to meet Wynn. Legal guidance from the Agency's attorney was apparently not sought prior to the making of these arrangements. In an effort to avoid violating the Brown Act, the Project Manager arranged two separate, i.e. "serial" meetings with Wynn, each to be attended by two Board members. The annual Las Vegas conference meetings routinely attended by Board members had followed the same format. The Executive Director, apparently also involved in these arrangements, stated, "I relied upon my own understanding of what was required to comply [with the Brown Act.]" He "felt that the Board members thought the way we had structured the meeting would comply [with the Act]."

At least one Board member who attended one of these meetings agreed. He was not concerned with any potential violations of the Brown Act since there were "two separate meetings." This Board member also stated that such meetings occur frequently, in that developers meet with Board members "all the time … but it's the same thing, you never have more than two [Board members] in the same room." The Agency's Executive Director and Project Manager attended both meetings. **As a result on May 25, 2004 four (4) members (a majority) of the Board met privately with Mr. Wynn in Las Vegas in two (separate) serial meetings.** Recollections as to what was transpired at these meetings vary.

One Board member who attended the first meeting characterized its format as "Meet and Greet," in which no presentation was made, and the purpose of which was to familiarize Wynn with Garden Grove. The other Board member attending this first meeting, however, stated that, while Wynn "did most of the talking," the Agency's Executive Director made a presentation to Wynn using display charts or "boards." These charts were an "outline of Harbor Blvd and the various tourist attractions that are on Harbor Blvd [International West] and the potential areas where the City was interested in putting attractions." The location of the Firestation Hotel property was pointed out as the "desirable location for any big

entertainment attraction."

The Executive Director characterized the purpose of the meetings as "sort of a meet and greet." He described the first, meeting, which began at "approximately 3:00 o'clock" P.M., as an "opportunity to sell Garden Grove to Mr. Wynn…to show off Garden Grove," i.e. "to show all the attributes of Garden Grove, our proximity to Disneyland, our proximity to the Convention Center, the successes we've already had in our hotel development and how we intend to continue that with our International West concept." In essence, the Executive Director said, "We spent 20 minutes selling Garden Grove as best we could." The Firestation Hotel site, owned by the Agency, was identified as the potential property involved, and the need to get a compact from the Governor discussed. There was some discussion about issues that would need to be addressed concerning having an Indian casino "to the extent about what we knew about that." "We knew that we would have to obtain…permission or get approval from Dept. of Interior to create an off reservation site for the tribe and that the tribe would have to get a compact through the Governor's office."

During the remainder of the time Wynn discussed his philosophy of building "luxury casinos," with "big shops and fancy hotels." He talked about his contacts, accomplishments and the famous people he knew. At one point Mr. Wynn called the Governor's office to inquire as to the feasibility of getting agreement for an Indian casino in Garden Grove. The Executive Director said that at the meeting's conclusion, Wynn was "non-committal." After the meeting, the two attending Board members were then shown models of casinos being built by Wynn. This first meeting lasted a total of 45 minutes. A break of fifteen (15) minutes separated the first and second meetings, both of which occurred in Wynn's Office. The Board members who attended the second meeting were called up from another floor. The second meeting started at about 4:00 P.M.

Since the Executive Director did not make his promotional presentation at the second meeting he felt, "It really changed, sort of, the flavor of the meeting." It was really an opportunity for [Wynn] to try to get acquainted with [the attending Board members]." "Then he spent the majority of the time talking about all his famous contacts and who he entertains and those kinds of things." There were "a lot of pleasantries, but not much more than that." There were no specifics discussed in regards to the [Firestation Hotel property]. The Executive Director did say, however, that one of the attending Board members "tried to stress how innovative the agency's been, and the vision they have, in terms of developing this. "That was probably about the most that was said." The meeting lasted "30 minutes or so."

That same Board member had a somewhat different take on what happened at the second meeting. He said that, "There wasn't a lot of discussion about development potential or terms or conditions or size or scope, or whatever." "[Wynn] bragged a little bit about what he's accomplished, what he's doing there. "We talked a little bit about…what would have to occur with the Indian tribe, that they needed federal recognition or federal approval." There was also "quite a bit of discussion" about whether the Governor would "sign off" on the casino. This Board member felt that this was "apparently underway." The tribe had "very active contact with the Governor's Office," and that this was "further along" than he'd realized until that moment. (It should be noted that this opinion is disputed by others in attendance.) This Board member also said that Wynn claimed that he knew the Governor

and that he would "probably approve something like this." When this Board member pointed out that the Governor had expressed opposition to Indian casinos in urban areas, Wynn said that "there's always exceptions to the rule" and that he knew the Governor, and that the Governor would support the casino "if there was no community opposition."

After the meeting this same Board member characterized the meeting to the Executive Director thusly. "He [Wynn] dropped a lot of names and was very sociable but he doesn't even know where Garden Grove is." The Executive Director responded that they'd discussed "a little bit more details in the first meeting," and Wynn's staff would visit Garden Grove and that "maybe that [would] be a chance…to meet and talk some more details with them." (Note: the Executive Director said that the stated intention of Wynn's staff to visit Garden Grove was not expressed at either of the meetings, but only after the Agency's officials had returned to Garden Grove.)

The other Board member who attended the second meeting characterized it as, "more in the nature of a "Meet and Greet." He also stated that, "Mr. Wynn did most of the talking. "He talked more…of a political nature…. "He knew a lot of people…who you see on T.V. every night." "He dropped a lot of names." This Board member stated that was what he "remember[ed] most of that meeting," and that there was no presentation made. It was just a "meet and greet." There were no discussions regarding the Indian gaming concept that he could recall, nor were there any discussions on any particular pieces of property in Garden Grove that might be available for such a venture. The meeting lasted "30-40 minutes." Although this Board member saw the other members who had attended the first meeting, he did not talk with them about the contents of the meetings. This member never discussed the contents of first meeting with either the Board members or staff who'd attended it.

The Project Manager described the two meetings as follows: "We talked in general." "It was more of [a] meet and greet meeting with Mr. Wynn, him telling us about his Las Vegas and Chinese developments, more of just an introduction meeting *and getting to know what kind of projects he was working on*. "…Also our [Agency Director] showed our International West Master Plan."

Several days after these meetings, a member of Wynn's staff contacted the Project Manager and indicated that in order to proceed further, Wynn needed a confidentiality agreement. As explained to the Project Manager, "The reason for the agreement was for individual parties from the city that would receive information from Wynn Resorts, not to disclose proprietary information and information that they owned to others, trade secrets and proprietary information." A mutual non-disclosure agreement was then e-mailed to the Project Manager. He referred to the Agency's attorney, who then returned it with some changes.

On **June 3, 2004**, a draft of the agreement was circulated among Board members attached to the weekly memo to the Board. This memo informed the Board members that, "…if we were to have any further discussions with the Wynn folks, that they would ask anybody associated with the project to execute the non-disclosure [agreement]."

On **June 8, 2004** the Board met in **closed session**. The fourth agenda item, placed by the Project Manager, stated: "Pursuant to Government Code section 54956.8, the Agency will

give direction to its negotiator (Agency Director) regarding the potential sale of property located at 12625 Harbor Boulevard, APN 231-431-02 (Firestation Motel)." The Project Manager, who'd "agendized" this item on his own, did not include the identity of the person with whom the Agency was to negotiate since he did not know that information. At least two Board members stated that professional staff is relied upon to ensure agenda compliance with the Brown Act.

Discussions involving this fourth agenda item apparently were not limited to "the price and terms of payment for the purchase, sale, exchange or lease," of real property as required by Govt. Code § 54956.8. One Board member declined to participate in any discussions involving this agenda item and left the room. A remaining Board member **described the discussions as "preliminary and generic," another stated that the discussions were about "*whether to proceed*" with the casino project.** Still another Board member said that discussions centered on whether the "Firestation Motel" property could be sold as a *possible* site for the casino. The Agency Director indicated that he asked the Board if the Indian casino concept was something the Board wished "to have staff further explore any further." The response, according to the Director, was, "Go ahead continue, and have further discussions."

"[A]fter we had concluded the discussion in terms of whether they were interested, [the Agency Director] then asked them if anybody who had a chance to review the non-disclosure [agreement],…were prepared to execute that because, I did need it before June 14th." The Director explained there was a tentative meeting with Wynn's associates scheduled for June 14, the purpose of which was to discuss "some of the particulars" of the Indian casino concept. Wynn's associates had asked those "individuals who may be involved in exploring this concept to sign a non-disclosure agreement." "Wynn had asked that if anyone was going to be in attendance at that meeting **or have any further discussions regarding this concept** that they sign the non-disclosure agreement prior to that." Three of the Board members, a quorum of the Board, indicated that they were prepared to sign it.

"After the meeting and the discussion had ended," the Executive Director obtained the signatures of the three signing Board members. Two Board members did not sign it. The Agency Director, his deputy, the Project Manager, Economic Development Manager as well as the Agency's Counsel also signed. The Director did "not believe [the signing of the agreement] to be part of the meeting." "I believe the discussion ended, and prior to them exiting, I wanted to get as many signatures as I could, because I wouldn't have a chance to meet up with them before the 14th. "This was my best opportunity to get as many signatures prior to the 14th."

The agreement purported to bind the <u>individual</u> signers, described as the "Garden Grove Parties." It obligated them to maintain the confidentiality of "certain information that [Wynn] consider[ed] proprietary, confidential or both, and which [Wynn] desire[d] to keep confidential." This information was "in connection with discussions between Wynn and [the Garden Grove parties] concerning the evaluation of a potential project [i.e., the Indian casino] located in Garden Grove."

The document provided the following definition of "confidential information."

> "Confidential Information" includes, ***but is not limited to***, trade secrets, discoveries, ideas, concepts, know-how, techniques, designs, specifications, drawings, diagrams, data, computer programs, business activities and operations, customer lists, reports, studies, and other technical and business information of a unique nature. **Confidential information also includes descriptions of the *existence* or progress of the above described evaluation.** (Emphasis added.)

In addition, in the section entitled "Identification of Confidential Information," the agreement broadened this definition further: "In addition **the fact that discussions between the parties are taking place shall be considered Confidential Information and shall not be shared with third parties without *the prior written consent of Wynn*….**" (Emphasis added.) The agreement also provided that "the Confidentiality obligations herein shall not apply to disclosed information [where] the receiving party can prove…the Confidential Information is subject to disclosure under the California Public Records Act."

In the event of "legal proceedings requiring disclosure of Confidential Information," the "Garden Grove Parties" were further required, at Wynn's "request" to "reasonably cooperate with [Wynn] in contesting such request." The agreement granted to Wynn the right to compel the "Garden Grove Parties" to "cease and desist all unauthorized use and disclosure of…Confidential Information." The agreement further provided that: "Only the Garden Grove Parties that execute this agreement shall be bound by the terms hereof and ***no confidential information shall be shared with employees of the City of Garden Grove who are not Garden Grove Parties."*** (Emphasis added.) This and the other terms were binding "upon the parties to this Agreement *and their respective successors*…." (Italics added) Finally, it was provided that, "This Agreement shall be governed and *construed in accordance with* the Laws of the *State of Nevada*." (Italics added.)

The Executive Director understood that the meaning of the agreement was that, "Wynn wish[ed] that any of their trade secrets, any of their proprietary information, any of their intellectual properties, that that type of information not be disclosed. And that's what they were asking to be protected." It was the understanding of three Board members that the purpose of the agreement was to protect Wynn's proprietary information and trade secrets. Two of the signing Board members stated that other than this, there was no one there to further explain the agreement. They signed it without reading it very closely. These Board members stated that they assumed that if there was "something wrong with the agreement," the Agency's staff would have told them so.

Another Board member, however, questioned the need for the agreement. He was told that Wynn wanted the agreement because "he did not want his name publicized as being attached to the project," and that **the agreement would help show that the City was "committed to move forward.**" This Board member did not wish to "pre-commit" to the project as he did not necessarily support it. The same Board member stated that there was further discussion at the June 8th meeting as to the "next steps to take in approaching the County government... [to see if they would] approve or not oppose" an Indian casino in the

County. The discussion was also about "approaching neighboring cities…, how they would do that, when they would do that and who would do that."

The result of the meeting was a direction by the Board to its staff to continue exploring the Indian Casino concept. The June 14th meeting was now no longer tentative. When asked if this coming meeting was tentative, the Executive Director stated, "…Had the Agency directed us, 'No, this isn't a good idea, we're not interested,' then there would have been no reason to have the [June 14th meeting]. "So, it wasn't until that staff got an indication that, 'No, go ahead and have further some discussions….'"

On **June 14, 2004** the Agency's Director, Project Manager and the Agency's Attorney met with representatives of the interested Indian tribe and Wynn Resorts. The tribe had brought an attorney who specialized in securing compact negotiations with the Governor's Office. The purpose of the meeting was to inform the other participants (the Agency's staff and Wynn's representatives) about the process to obtain a compact with the Governor's Office. In that meeting it was revealed that in order to pursue the Indian Gaming Concept the Governor's Office took the position that there be no "major opposition" from either a bordering city or the County. The Director stated that, "It was suggested that we meet with the County of Orange, the Sheriff and the City of Anaheim. "So, there was some strategy as to how we would do that."

On **June 22, 2004** the Board again met in closed session. In describing the casino topic, the Project Manager employed the similar language on the agenda as he'd used for the earlier June 8th meeting. " When asked to explain the absence of the names of negotiating parties on the agendas for both the June 8th and 22nd meetings as they pertained to the Firestation property, the Agency Director said, "Because things were so preliminary, we didn't have complete understanding of how the mechanics would work. We didn't know who the other party would be at that time…. "We were talking about concepts of Indian gaming and a resort, but it was too preliminary…."

Initially all members were present at this meeting, however, one Board member who earlier had not signed the Non-Disclosure Agreement declined to participate in this portion of the closed meeting and left the room. The Agency director described the purpose of this agenda item as follows: "With the limited knowledge of the process to obtain a compact, and some of the things we would have to do, we then went back into closed session on June 22nd, to advise the Agency of what's involved if we were to sell the property for purposes of an Indian gaming facility, what would be required to do that

Again some recollections as to what transpired at this meeting differ. Another Board member indicated he would not sign the agreement. This member declined to leave the room. Two Board members stated that there was no discussion about the casino project. One of these members, however, recalled learning from the City Manager that the Governor's Office required that there be no opposition from the County and neighboring cities. This same Board member also stated that at this meeting the Board decided to address that issue before proceeding further. The two other Board members could not recall any discussions regarding the Indian casino at this meeting.

The Agency's Executive Director recalled discussions concerning the Firestation property. When asked if there were any discussions regarding any specifics about the property, such as price, the Director said, "It was a concept that was very preliminary there wasn't enough information to get to that level of specificity." He described the discussion that did take place thusly: "After we advised them [i.e. the Board] of some of the steps that were required, was there still interest to continue having discussions regarding developing that concept on that property." The Director said that the Board gave an affirmative response to this inquiry, but that there was "no action" taken at this meeting. He explained, "We received direction to continue exploring this concept and to comply with what the Governor's Office had suggested we do. We got authorization or direction to meet with the County." As a result arrangements were made to meet with County officials.

The initial meeting with County officials involved the Executive Director, the Agency's Attorney and the County's CEO. It took place at the **end of July, 2004.** At this meeting, the CEO was asked for advice as to what was the best approach to meet with the Board of Supervisors. The CEO indicated he'd consult with the Board's Chairman. A subsequent phone call advised the Garden Grove officials to meet with the Supervisor whose district would be most impacted by the proposal. This meeting was then arranged.

On **August 12, 2004**, the Executive Director and a Board member met with this County supervisor. This supervisor indicated that he did not like the idea.

On **August 17, 2004**, at a public meeting of the Board of Supervisors, this supervisor revealed that Garden Grove had been proceeding with plans for Indian Casino.

On **August 24, 2004** the Executive Director and a member of the Board met with the mayor and staff members of a neighboring city. This mayor also expressed active opposition to an Indian casino in Garden Grove. The mayor also said Disneyland would oppose an Indian casino.

Also on **August 24, 2004**, **in a public meeting, the Board decided to cease all further discussions on the Indian Casino proposal.** A Board member stated that **"the casino plan was in the *embryonic* stage and that bringing the process to light so early was counterproductive."** Arguing against the notion that the matter should have been in the public forum sooner, this same Board member stated that, "**You can't tie a city in knots and expect results."**

Prior to the events discussed above, the City had provided no formalized classroom training on the Brown Act to members of the Board or other officials.

ENFORCEMENT OF THE BROWN ACT

Compliance with the Brown Act is considered of great importance by the Legislature. "The Legislature hereby finds and declares that <u>complete, faithful, and uninterrupted compliance</u> with the Ralph M. Brown Act (citation) is a matter of <u>overriding public importance</u>." (Government Code § 54954.4 (emphasis added).) Accordingly, the Brown Act contains several enforcement provisions, both criminal and civil. Criminal actions are

applicable only to elected members of a legislative body and require a specific intent and action taken.

> **Each member of a legislative body** who attends a meeting of that legislative body where **action is taken** in violation of any provision of this chapter, and where the member **intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter**, is guilty of a misdemeanor. (Government Code section 54959 (emphasis added).)
>
> "**Criminal penalties are available only where some action is taken by the legislative body in knowing violation of the Act**." [Citation.] Civil remedies are available to prevent further or future violations and do not require knowledge, or action taken." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1287 (emphasis added).)

The **term, "action taken**," in turn:

> **[M]eans a collective decision made by a majority** of the members of a legislative body, **a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision**, **or an actual vote by a majority** of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (Government Code section 54952.6 (emphasis added).)

Civil actions to enjoin violations of the Brown Act do not require any specific intent or act in furtherance of that intent.

Civil enforcement powers include injunctive and declaratory relief, to prevent violations or threatened violations, or to "declare," past, or threatened future conduct, to be in violation of the Brown Act and to have actions undertaken in violation of the Act declared "null and void." The latter power, to declare an unlawful action null and void is subject to some limitations. The District Attorney must first notify the legislative body of the violation *and* make a demand that it be corrected. The legislative body is thereafter accorded a "grace period" in which to correct, cure or undo its violation of the Act. (See Government Code section 54960.1, subdivisions (a), (b) and (c).)

If the Legislative body corrects the unlawful act, it shall not be deemed a violation of the Brown Act, and any action by the District Attorney shall thereupon be dismissed.

> **During any action seeking a judicial determination pursuant to subdivision (a) if the court determines…that an action…in violation [the Act] has been cured or corrected by a subsequent action of the legislative body, the action filed [by the District Attorney] pursuant to subdivision (a) shall be**

> **dismissed with prejudice.** (Government Code section 54960.1 , subd. (e).)

In addition to this power:

> The district attorney or any interested person may commence an action by mandamus, **injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations** of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body…. (Govt. Code § 54960, subd. (a).)

Neither notice nor a corrective "grace period" are required for actions brought for injunctive or declaratory relief under this section.

> These time requirements [i.e., the "grace period"] and cure and correct provisions are contained only in section 54960.1 and not in section 54960. We interpret this to mean that **these provisions apply only when a party seeks to have a particular action of a legislative body declared null and void and not when suit is brought under section 54960 to determine the applicability of the Act to past conduct or threatened future actions of the legislative body.** [Citations.] Therefore, contrary to appellant's assertions, the District Attorney in this case could have filed an action at any time seeking declaratory or injunctive relief under section 54960. (*Ingram v. Flippo, supra,* 74 Cal.App.4th at 1287-1288 (emphasis added).)

"Declaratory relief" under Government Code section 54960 is available for past violations where there is a dispute as to whether or not a violation occurred, on the grounds that a denial that past actions were violations of the Act may support an inference that such violations will reoccur.

> [F]or its part [defendant] city does not believe any violation has occurred. City's belief as to the propriety of its action may be found… **in city's failure to concede that the facts alleged by plaintiffs constitute a violation of the Brown Act….. See *Common Cause v. Stirling* (1983) 147 Cal. App. 3d 518, 524 [195 Cal. Rptr. 163] [courts may presume that municipality will continue similar practices in light of city attorney's refusal to admit violation].)** Thus there can be no serious dispute that a controversy between the parties exists over city's past compliance with the Brown Act and the charter. **On that basis alone plaintiffs are entitled to declaratory relief resolving the controversy**. (*California Alliance for Utilities etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1030 (emphasis added).)

Therefore, **"the ripeness doctrine does not require that to obtain declaratory relief [the plaintiff] allege and prove a pattern or practice of past violations. Rather, it is sufficient to allege there is a controversy over whether a past violation of law has occurred."** (*Id.,* at 1029, Emphasis added.) "[I]n the absence of declaratory relief plaintiffs will have some difficulty in preventing future violations." (*Id.,* at 1031.)

ANALYSIS AND CONCLUSIONS

Criminal Liability

a) There are insufficient grounds to support a finding of criminal liability.

Criminal liability attaches to "action taken" by a legislative body where a member thereof harbors the intent to deprive the public of information to which he/she knows, or has reason to know the public is entitled. **There were several events that could constitute action taken under this definition, the most notable of which is the execution of the Non-Disclosure Agreement.** A collective decision to proceed with a feasibility study of the casino project or to instruct the staff to further study or explore potential opposition in neighboring cities also would fall within the definition of "action taken."

There is, however, insufficient evidence to establish the requisite knowledge and intent beyond a reasonable doubt necessary to establish criminal liability. Significantly, no formal training on the Brown has ever been offered to Board members or staff. Thus knowledge of case law and Attorney General's opinions that interpret the statutory language of the Brown Act was not provided. An example would be those cases that have discussed "serial meetings." While it may be argued that a bland reading of the statute may lead one to conclude that such meetings are lawful, knowledge of the interpretative case law would have imparted the awareness that they clearly were not.

Another example would be those cases that hold the Brown Act applicable to not only "deliberative," or "decision making," meetings but also those held for the "collective acquisition and exchange of facts *preliminary* to the ultimate decision." A Board member's comment that the discussions concerning the Indian casino were "preliminary and generic," as well as that of another describing the process as "embryonic," illustrate an unawareness of this body of law. Such comments evince a belief that the Act permits the "crystallization of secret decisions to a point just short of ceremonial acceptance." **(***Frazer v. Dixon Unified School Dist., supra*, 18 Cal. App. 4th 781, 794-795.)

Another significant factor is that throughout this period, Board members relied upon the advice of the Agency's staff, including its Executive Director, Project Manager and the Agency's Attorney. The Project Manager, for example, arranged the serial meetings in Las Vegas. The Agency's attorney reviewed the Non-Disclosure Agreement before returning it with some changes. Under these circumstances, and given the lack of formal legal training they'd received, Board members could justifiably and reasonably have felt their conduct to have been in compliance with the law. **These circumstances argue against a finding of criminal intent on the part of any Board member**.

Civil Liability

b) There are, *at present,* no grounds for an injunction against the City.

In this matter, by its action to abandon pursuit of the Indian casino idea at a public meeting on August 12, 2004, the Board has rendered moot any potential cause of action for injunctive relief. Actions of the Board in violation of the Act while pursuing the Indian casino concept were "cured" by the Board's action in abandoning that pursuit. As a result there are presently no grounds for an action for an injunction to undo or void any decision or action taken in violation of the Brown Act.

c) An action for declaratory relief is, *at present*, not warranted.

Declaratory relief is available "when there is a controversy over whether a past violation has occurred," since it can be presumed that under such circumstances future violations are "threatened." As this report is being written these circumstances do not *yet* exist. The "ripeness doctrine" holds that declaratory relief is therefore *at present*, not warranted.

In sum it is the conclusion of the District Attorney's Office that no *present* cause of action, either civil or criminal, against the Agency or any of its officials, is established by the evidence. However, it is important to distinguish this conclusion from that of whether the Brown Act was violated. It is, in fact, also the conclusion of the District Attorney's Office that in the proceedings involving discussions of an Indian casino, the Brown Act was violated in several instances.

FINDINGS

1. **The meeting(s) in Las Vegas on May 25, 2004 involving a majority of the Board, in the opinion of this office, violated the Brown Act. While there are no published cases specifically interpreting the 1993 amendments to the Brown Act, and the evidence is not unqualified, we believe that the correct interpretation of the statute, its amendments and the available evidence, establishes these meetings as having been held in violation of the Act.**

   The use of two "meetings" involving a majority of the Board in the Las Vegas meeting created the impression of an evasive subterfuge. There are two potential issues that should be addressed in deciding whether an actual violation of the Act occurred. First, could the two separate meetings held in the same room but 15 minutes apart likely be ruled to be a single meeting as defined under § 54952.2(a)? Secondly, if not, did the two separate meetings nevertheless violate § 54952.2(b)?

   Section 54952.2(a) as enacted in 1993 defines a meeting as "any congregation of a majority…*at the same time and place to hear*, discuss or deliberate on any matter [under its jurisdiction.]" The statute appears to have codified prior cases (and Attorney General's opinions), holding that meetings which involve a legislative majority in the "collective discussion *and* the collective acquisition and exchange of facts preliminary to the ultimate decision," are subject to the Brown Act's open

meeting requirements. (See Attorney General's Booklet, *The Brown Act*)

However, determining whether both "meetings" potentially would be held to have actually constituted a single one depends upon the interpretation of the phrase "at the same time and place." Here the Board members met in meetings in the same office, set to begin an hour apart, with the second meeting beginning about 15 minutes after the first. The purpose of both meetings was similar, to meet and ostensibly discuss an Indian casino project with Mr. Wynn. Question: Would a court interpret these to be "at the same time."

As has been pointed out the language of the Act is to be interpreted with its intent in mind, "to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government." Although there is no published case yet interpreting this portion of the amended statute, given the case holdings declaring that the "Brown Act…is to be construed liberally in favor of openness in conducting public business," it is not unlikely that a court could interpret meetings, held so close in space and time, as they were here, to be an "evasive devise." Since it has been held that **"[i]n this area of regulation…a statute may push beyond debatable limits in order to block evasive techniques,"** a court could likely rule that the two meetings here constitute a single meeting at the same time and place, held separately as an attempt to evade the Act. Such a ruling would be consistent with the intent of the Act and the cases that have interpreted it.

If the meetings do not constitute a single one under § 54952.2(a) did they nevertheless violate the prohibition against serial meetings under § 54952.2(b)? That section precludes the "use of…a personal intermediary…by a majority of the members of the legislative body ***to develop a collective concurrence*** **as to action to be taken on an item…**." The language whose meaning may be at issue here is "develop a collective concurrence." The Attorney General's Office, as noted, concludes this language must be read in light of the Act's intent and earlier cases interpreting the Act. Accordingly, "***such activity would include any exchange of facts*** **or,…substantive discussions which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue" regarding an agenda item.** The Attorney General further points out that an "agenda item" should include "items that have been placed on an agenda or are **likely** to be placed on an agenda.

Under these criteria, the issues boil down to these questions: (1) Was there "any exchange of facts" at both meetings? (2) Alternatively, at both meetings were there "*discussions which advanced or clarified a member's understanding of an issue, facilitated an agreement or compromise amongst members or advanced the ultimate resolution of an issue" that was either on an agenda, or likely to be placed on an agenda.*

The first of the "two meetings" involving two Board members appeared to meet these criteria. At that meeting the Agency's executive director made a promotional presentation on the advantages of development in Garden Grove. In his own words his effort was in "selling Garden Grove as best we could…." The property thought of

as the “desirable location for any big entertainment attraction” was pointed out. The necessity of securing a compact with the State’s governor was also discussed. During the meeting a phone call was made to the Governor’s Office. Wynn discussed his contacts, accomplishments and his philosophy of building “luxury casinos,” with “big shops and fancy hotels.” Clearly this meeting appears to have been an “exchange of facts,” or, alternatively, discussions advancing or clarifying Board members’ understanding of the Indian casino concept. Likewise they appear to have advanced the ultimate resolution of that issue, if not facilitating an ultimate agreement or compromise. To be sure there is no evidence that the casino issue had yet been placed on an agenda, but this was very soon to change. Clearly under the circumstances both leading up to and at the meeting, it can be concluded that the Indian casino concept was “likely” to be placed on an agenda, as in fact it soon was.

The events of the “second meeting” are somewhat less definitive. Two of the four attendees from the Agency characterized it as “meet and greet.” (The Project Director said that in addition the meetings were for the purpose of “*getting to know what kind of projects [Wynn] was working on,”* however whether this occurred at the first or second meeting is not distinguished.) The Executive Director, said there were a “lot of pleasantries but not much more than that,” and that since no promotion was made, it “changed…the flavor of the meeting.” It was, the Director said, more of an “opportunity…to get acquainted,” and “no specifics were discussed” concerning the property contemplated as the sight of a future resort. According to the Director, “about the most that was said” was a Board member stressing the “innovati[on] and “vision” of the Agency.

The same Board member, who’d “stressed” this, also stated that Wynn “dropped a lot of names” and was “very sociable.” His remarks apparently inferred to the Executive Director, to whom he was speaking, that not much else had transpired, prompting the Director to respond, that there were “a little bit more details in the first meeting.” This same Board member stated, however, that this meeting contained “quite a bit of discussion” concerning whether the Governor’s Office would support a casino. He recalled an exchange with Wynn about the Governor having previously expressed opposition to Indian casinos in urban areas. Wynn’s response was that there were “exceptions to the rule” and that the Governor would support a casino “if there was no community opposition.”

If these latter comments are accurate, then it would appear that something of substance, more than “meet and greet,” or “pleasantries” was discussed at the second meeting. Such conversations would constitute an “exchange of facts,” or “substantive discussions which advance[d] or clarif[ied]…understanding,” or “ultimate resolution” of the soon to be “agendized” Indian casino issue. Under the Attorney General’s interpretive guidelines, which are based on the Act’s intent, these discussions together with those of first meeting, would likely constitute “the use of a personal intermediary [Wynn or other non Board attendees] by a majority to develop a collective concurrence as to action to be taken on an item.” A violation of § 54952.2(b) would therefore lie. Discounting the latter comments of this Board member still leaves the Executive Director’s statement that this Board member had essentially “pitched” the Agency to Wynn, stressing its innovation and vision at this

meeting. Again, using the Attorney General's guidelines, a violation of § 54952.2(b) is still likely established.

The Brown Act provides for exceptions where *less* than a quorum can participate in such information gathering and exchange meetings. Government Code section 54952.2, subdivision (c)(1) provides for individual contacts, so that, for example, one, or perhaps two, council members could have met with Wynn and reported back to the Agency. Under Government Code section 54952, subdivision (b), an "advisory committee," composed solely of two Board members, could have met with Wynn, again reporting back to the full Board. The Agency's staff could have gone and reported back to the full Board *in a public session.* These exceptions, however, were not employed.

2. A portion of the June 8, 2004 closed meeting of the Board was in violation of the Brown Act.

Meetings that involve discussions characterized as "preliminary" or "generic," that decide "whether to proceed," whether to "explore the…concept further," whether to ascertain if other governmental entities will oppose the concept, or whether it would be "possible" to locate a development on a certain site all involve the "deliberation," or the "collective acquisition and exchange of facts preliminary to the ultimate decision" that are subject to the requirements of the Brown Act. Based on the evidence developed it appears that these discussions did not solely involve the purchase price and terms of payment. Therefore, such meetings are not conducted in compliance with the Brown Act. To the extent there were such discussions concerning the "Firestation Hotel Property," or the Indian casino concept, which did not involve price or terms of payment, they were done in violation of the Brown Act.

This meeting was also improperly described on the agenda. The Project Manager's "justification" that he could not identify a party to the negotiation because he did not know that information is insufficient. This information "must" be disclosed in a prior open meeting *or* posted on an agenda *before* any such meeting occurs. If this requirement cannot be met, the meeting cannot *lawfully* be held. The failure to fulfill this requirement also meant that the portion of that closed meeting, which involved discussions of this agenda item, was in violation of the Brown Act.

3. The signing of the Non-Disclosure Agreement on June 8, 2004 was in violation of the Brown Act.

The signing of the Non-Disclosure Agreement on June 8, 2004, by a majority of the Board, was not an action that was permitted to be performed in a closed session under any of the limited exceptions to the open meeting requirement of the Act. The fact that some observers thought the meeting to be over does not necessarily render it so. The term "meeting" is defined by the Legislature to be any "congregation of a majority of a legislative body at the same time and place to hear, discuss or deliberate…." In this particular case, moreover, there appears to have been a collective concurrence as to action to be taken. The evidence indicates that a quorum of the Board, in response to an inquiry by the Executive Director, expressed

willingness to sign the agreement while they were still gathered in the same room. They signed it before leaving the room. To hold that the meeting had been "adjourned" and that therefore there was no violation would constitute an effective repeal of the Legislature's definition. This would allow any local Legislative body to step outside of that definition by simply stating, "Meeting adjourned." Moreover, the fact a "meeting" on this topic might have been inadvertent does not excuse it from compliance with the Brown Act.

The argument that this did not constitute a violation of the Brown Act since the signatories signed as individuals, thereby binding but themselves, not the Agency, is also not persuasive. Presumably they would have become aware of "confidential information" in their official capacities, since they would otherwise have no reason to engage in substantive discussions involving the casino with Wynn. Moreover, while acting in their official capacities, for example attending a Board meeting, they would nevertheless still be bound to conduct their "individual" selves in compliance with the agreement. Their compliance with the agreement, as individuals, could not but have the effect of binding the Agency whose members of the Board they were.

4. The terms of the Non-Disclosure Agreement, if carried out, potentially bound the signatories to further violate the Brown Act.

Due to its expansive definition of "confidential" information the Non-Disclosure Agreement potentially obligated its signatories, which included a majority of the Council, to deny the public information it might lawfully become entitled to know. The very existence or progress of the "evaluation" of the Indian casino project, including even the "fact that discussions [were] taking place" was deemed confidential. This is the very kind of information that the Brown Act contemplated elected bodies should discuss in the public forum. **By forbidding the disclosure of information the public potentially had a right to know, without the "prior written consent" of Wynn Resorts, the non-disclosure agreement could have obliged the Agency to either: (1) Violate the Brown Act by discussing these matters in closed sessions, (2) Breach the Agreement, (3) seek and secure Wynn's permission to disclose to the public "confidential information," or (4) in order to avoid these first three alternatives, have no further discussions or exchanges with Wynn whatsoever, thereby rendering the agreement moot.** The signers apparently believed that the agreement only protected Wynn's "trade secrets" or "proprietary information." The signing Board members indicated that they signed it without thoroughly reviewing it relying on "staff" to advise them if there was a problem.

The inclusion of the clause subjecting the agreement to the requirements of the California Public Records Act (Govt. Code § 6250 et seq.), while an admitted improvement, did not ensure compliance with the Brown Act. The California Public Records Act applies to "any writing containing information relating to the conduct of the public's business." The Brown Act requires that discussions, deliberations and just hearing matters within the subject matter of the Legislative body are, with limited exception, to be in the public forum. Moreover, in order to secure writings under a Public Records Act, a request must first be made. To make such a request, a member of the public must know, or at least suspect, the existence of the writing.

Simply including this clause in the agreement does not address the issue of how the public would even know enough to make such a request, given that the discussions and deliberations concerning the casino project, the agreement itself, as well as its signing were undertaken in meetings closed to the public.

Other worrisome clauses concern the obligations of the signers in the event of legal action to compel the disclosure of "confidential information." The agreement required the signing officials to "reasonably cooperate" with Wynn's desire to contest such action. Although modified by "reasonably", these terms could arguably obligate the signers to cooperate against a suit seeking information that should be public. Also troubling is the term requiring that the agreement was to be construed *and litigated* under the laws of a foreign jurisdiction, the state of Nevada. To be sure it is reasonably probable that such clauses would not be enforced by California courts as against public policy. Nevertheless, such a ruling might have come only after the expense of litigation.

Finally another clause provided that "successors" to the signatories were also to be bound by the agreement. A problematic, if speculative, interpretation could be that a public official, who succeeded to the position formerly occupied by a signatory, could thus find himself contractually obligated to the contract. Again, although, such a result would not likely be enforced by California courts, such a clause could conceivably generate avoidable expense.

5. **A portion of the June 22, 2004 meeting was in violation of the Brown Act.**

   As with the June 8, 2004 meeting, the June 22 one was not properly described in the agenda. The topic for discussion was not a proper one for a closed meeting under Govt. Code § 54956.8. As before, the failure to identify the negotiator for the selling party on the agenda also rendered the subsequent meeting in violation of the Brown Act.

   The discussions concerning the process needed to secure a Governor's compact are the type of discussions and decisions that should be in the public forum. It is important to note that these discussions apparently led to a decision by a quorum that the County be approached to ascertain if there would be any "major opposition" to an Indian casino, a decision properly made in the public forum.

RECOMMENDATIONS

In view of these findings, the Office of the District Attorney makes the following recommendations:

1. **The Agency should institute an appropriate formal classroom training program on the requirements of the Brown Act.**

   The Agency should institute a classroom training program, not only for elected officials, but also for city staff who routinely assist and advise these officials. Much of current applicable law is the result of court cases and Attorney General's opinions

that have substantially "fleshed out" the statute. Since these involve fact situations previously encountered by other elective bodies, they may impart more useful, practical knowledge than does a sterile reading of the act.

2. **The Agency's staff should exercise greater effort to ensure all meetings of its Council are held in strict compliance with the Brown Act.**
   Agency staff responsible for assisting in the arranging of meetings should ensure that all topics are properly disclosed in an agenda, and that closed meetings are scheduled only for topics that are properly the subject of closed meetings under the Act. Legal counsel should be consulted to review all closed meeting topics and agenda's to ensure compliance. Elected officials also should independently be watchful that agendas and meetings are in compliance with the Brown Act. When in doubt, these questions should be resolved in favor of full and open public meetings.

3. **In deciding which meetings are properly subject to the open meeting requirements of the Brown Act, the Agency should include meetings attended by a quorum that involve deliberations, discussions, fact or information gathering, investigation or fact exchanges.**

   The Brown Act's open meeting requirements are not limited to meetings where final decisions are made. The intent behind the Brown Act is that the public's attention be garnered early in the decision making process not later. Garnering that interest may attract opposition to favored proposals or pet projects. To attract public input into the early stages of the decision making process, however, is the very intent of the Brown Act. The fact that such attention may result in vigorous public participation and debate is the desired result, not one to be avoided. ***Those who participate in elected government positions involving the exercise of authority over their fellow citizens should expect to do so in the full light of the public's gaze.*** The Brown Act was enacted to ensure this.

4. **The Agency should avoid the use of serial meetings as a means to "comply" with the Brown Act.**

   If a meeting is otherwise subject to the open meeting requirements of the Brown Act, the participation of a majority in a series of meetings arranged to avoid the attendance by a quorum at any single meeting, will not necessarily avoid violating the Act. If a closed meeting will violate the Brown Act if a majority is present, multiple similar meetings collectively involving a majority will likely do so too.

   In addition, the use of techniques likely to be construed as "evasive," is likely to be ruled in violation of the Act. The Attorney General's guidelines, based on prior case law, argue that: "In construing these terms [regarding serial meetings], one should be mindful of the ultimate purpose of the Act—to provide the public with an opportunity to monitor and participate in the decision making processes of boards and commissions." It is recommended that the Agency follow these guidelines in the future and that a training regimen, including them, be instituted

5. **Neither the Agency, nor any of its officials, should execute any non-disclosure agreement that abrogates the responsibility to hold open and public meetings as required under the Brown Act.**

   As has been extensively discussed in this report the open meeting requirements of the Brown Act are premised on what can be simply termed as "the public's right to know." Only limited exceptions are provided. Under this type of legal framework, any non-disclosure agreement, that itself is not extremely limited, may be problematic, at best. Such agreements should be carefully scrutinized to ensure that complying with them does not potentially violate the Brown Act. The Agency, of course, will need to consider its responsibilities under the Brown Act of overriding importance so that **doubt should be resolved in favor of the "public's right to know**."

SUMMARY

This Office conducted an extensive inquiry into this matter in an endeavor to fully develop the facts and apply the applicable law to reach an appropriate result. We believe, consistent with the limitations of law and fact, that we have drawn the proper conclusions and made the appropriate findings. We have included an extensive discussion of the applicable law, along with a detailed discourse of the developed facts in support of these conclusions and findings. In the interest of providing guidance to the City in the future we have supplemented our analysis with recommendations for the future.

As result of our inquiry, this Office has concluded that: 1) Criminal prosecution is not warranted; 2) An action for injunctive relief would be moot; and 3) An action for declaratory relief is not *yet* ripe**. We have also concluded, however, that the Brown Act was violated in several instances** as detailed in our "Findings" section.

This Office therefore urges the appropriate public officials to review and compare the actions in this matter with the requirements of the Brown Act as outlined in this report. An appropriate awareness of the stringent requirements of the Brown Act should result from such a review. We further believe that a review of this report as well as an appropriate training regimen will foster a practice of appreciation of, and full compliance with, the requirements of the Brown Act, thereby better securing the sustained trust and goodwill of the public those in government are sworn to serve.